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# In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 240

FEDERAL TRADE COMMISSION, PETITIONER

*v.*

ALGOMA LUMBER COMPANY, BIG LAKES BOX COMPANY, California Fruit Exchange, et al.

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE FEDERAL TRADE COMMISSION

### OPINION BELOW

The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 1889) is reported in 64 F. (2d) 618. There were also preliminary proceedings with regard to the record on review. (R. 1883–1888; 56 F. (2d) 774.)

### JURISDICTION

The decree of the Circuit Court of Appeals was entered April 4, 1933 (R. 1899). Petition for certiorari was filed July 3, 1933, and was granted October 9, 1933. Jurisdiction of this Court rests

on Section 5 of the Federal Trade Commission Act, c. 311, 38 Stat. 717, 719 (U.S.C., Title 15, Sec. 45), and Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. *Falsity of label and comparative quality of products.*—Whether the labelling of forest products made from Pinus ponderosa (a species of yellow pine), by a term including the words "white pine" and their sale in competition with forest products made from true "white pine" is an unfair method of competition under Section 5 of the Federal Trade Commission Act (assuming the existence of competition and "public interest"); and whether, in addition to a misdescription of the character or kind of products, it must be shown that the misbranded articles were also inferior in quality.

2. *Effect of "simplified practice recommendation" of Bureau of Standards.*—Whether the "simplified practice recommendation" of the Bureau of Standards listing "standard commercial names" may be taken as ousting the Federal Trade Commission from jurisdiction to find, upon testimony, that one of the "standard commercial names" listed is falsely applied by certain manufacturers and constitutes an unfair method of competition; and whether, in considering the effect of misdescription upon consumers and retailers, the "simplified practice recommendation" of the Bu-

reau of Standards can be taken to demonstrate that the trade could not have been misled despite testimony and the finding of the Commission to the contrary.

3. *Usage, intent and desire to avoid identification with third product.*—Whether usage, innocence of purpose to deceive, or the desire to avoid identification with a third type of product may be taken to excuse misdescription which, otherwise, constitutes an unfair method of competition.

4. *Price differences.*—Whether, in determining confusion, as well as misinformation and injury to consumers and the trade in connection with the "unfairness" of the practice or the "public interest" in its suppression, it is material that (1) normally there was a difference in price between the misdescribed product and the true products, or that because of the misdescription (2) the misdescribed products brought a higher price than the same products truthfully branded, or (3) that the true products were forced down in price to meet the competition.

5. *Propriety of considering forest conservation in determining "public interest."*—Whether, in determining whether the "public interest" prerequisite was satisfied and sustained, the Circuit Court of Appeals could properly take account of the so-called public interest "in the conservation of the forests".

6. *Revaluation of the evidence by the lower court.*—Whether, despite testimony and the finding

of the Commission to the contrary, the Circuit Court of Appeals could properly "assume" that the lumber trade and "architects have a general knowledge of the qualities of the various materials they specify"; and whether the Circuit Court of Appeals, in reviewing the order of the Federal Trade Commission, is empowered to make its own independent appraisal of the evidence (regarding the falsity of the description of products and the effect of such misdescription upon both consumers, retailers and architects), draw its own inferences, reject the plain testimony of experts and other evidence in the record, ignore the Commission's findings, and annul the Commission's order based thereon.

## STATUTE INVOLVED

The relevant portion of Section 5 of the Federal Trade Commission Act is set forth in the Appendix, pp. 69–72, *infra*.

## STATEMENT

For a number of years complaints have reached the Federal Trade Commission that certain lumber producers in the West have labelled by terms including the words "white pine" the products manufactured from the species of tree known as Pinus ponderosa, whereas in fact that tree is not one of the "white" pines. Partly as a result of investigations, in 1924 some of the producers, notably those of the "inland empire" (including parts of Oregon, Washington, Idaho and Montana), volun-

tarily abandoned the practice and gave their products the trade name "Pondosa pine"; some California, Arizona and other producers did likewise; and a number of manufacturers, wholesalers and retailers of products made from Pinus ponderosa ceased the use of the phrase "white pine" to describe the lumber products made from Pinus ponderosa.[1] Certain western producers of lumber, however, after 1925 persisted in labelling the products of ponderosa by terms including the words "white pine." During the next five years "California white pine" became an even more important factor in the lumber market,[2] and finally proceedings were undertaken by the Commission which resulted in the orders to desist here involved.

The complaints issued by the Federal Trade Commission charged that respondents (who are

[1] See the finding of the Commission, Par. 32, R. 34. Before 1924 ponderosa from the "inland empire" was called "western white pine." A Michigan lumberman abandoned the term "California white pine" from the necessity of "absolute integrity in grades" which became apparent as a result of meetings called by Secretary of Commerce Hoover. (R. 339–340.) A California manufacturer testified to the same effect (R. 1184–1185) as did a Minnesota (R. 328) and other manufacturers (R. 860, 1019–1022) because it was "misleading to the consuming public" (R. 620). Some of these changes were made at the instance of the Federal Trade Commission. (R. 1753–1754, 1763.)

[2] Architects, retailers and manufacturers testified that "California white pine" had noticeably entered the market only within the "last four or five years." (R. 625, 644, 737, 749, 279, 536, 92, 72, 76.)

twelve of a group of fifty manufacturers on the Pacific Coast against which the Commission issued similar complaints on May 23, 1929) engaged in "unfair methods of competition in interstate commerce in violation of the provisions of Section 5" of the Federal Trade Commission Act in their use of the phrase "white pine" (almost always used with other qualifying words such as "California") in the manufacture and sale of forest products from a species of tree native to the mountainous regions of the Pacific slope, botanically designated "Pinus ponderosa", the latter being neither a true botanical white pine nor its lumber equal in quality or price to the true white pine. The complaints also charged that respondents were competitors of the manufacturers of the true white pine, and that the manufacture and sale of lumber, different in kind, quality and price, under the same or similar name, resulted in confusion and misled and deceived both the trade and consumers in numerous particulars. (R. 5–11.) The respondents answered (R. 12–23), the cases were consolidated (R. 24–26), and the testimony of nearly 200 witnesses was taken before examiners at hearings held in Massachusetts, New York, Michigan, Indiana, Illinois, Wisconsin, Washington, Oregon, California, Arizona, and New Mexico (R. 49–1877). Thirty-nine simultaneous reports of findings of fact and conclusions were filed and cease and desist orders were issued; of these, twelve are the subject of this proceeding. (R. 26, 46, 47.)

The Commission's findings of fact (comprising eighty paragraphs, R. 28–44, plus fifteen paragraphs of summary and conclusions of fact, R. 44–45) may be summarized and grouped as follows:

(1) Certain pine species have long been known to botanists, lumber technologists, and the public as the white-pine group (Par. (b), R. 44), particularly the northern white pine, the lumber products of which for more than 200 years have held a preeminent reputation with the trade and public for their qualities (Par. (c), R. 44; Par. 16, R. 30; Par. 17, R. 31), and as a result of this long and sustained reputation the consuming public understands that "white pine" is not merely a white colored pine but lumber made from a true white pine species. Par. (d), R. 44; Par. 19, R. 31. Not only do producers and dealers in true white pine describe their product as "white pine", but a substantial number of dealers in various species of pines sell only this true white pine upon orders for "white pine." Par. (f), R. 44; Par. 65, R. 40.

(2) Another species of pine, Pinus ponderosa, does not belong either botanically or in public understanding to the white-pine group (Par. (e), R. 44; Par. 26, R. 32), its lumber products being inferior to the true white pine in important qualities and for important uses. Par. (e), R. 44; Par. 10, R. 30; Par. 40, R. 35; Par. 43, R. 36; Par. 44, R. 36; Par. 52, R. 37; Par. 54, R. 37; Par. 55, R. 38; Par. 56, R. 38; Par. 57, R. 38. But ponderosa

products actively compete with true white pine in many uses. Par. 58, R. 38; Par. 59, R. 38. More than half the ponderosa is now marketed without the word "white" (e.g. "Pondosa Pine"). Par. 33, R. 34.

(3) Respondents, among others, are engaged in producing and marketing this latter species, Pinus ponderosa, the products of which they designate, nationally advertise, and sell under a term including the phrase "white pine." Par. (a), R. 44; Par. 3, R. 28; Par. 29, R. 33. The practice of labelling the products of ponderosa as "white pine" for sale beyond the places of production had become increasingly common until 1925; now somewhat less than half the ponderosa is so marketed. Par. (i), R. 45; Par. 30, R. 33; Par. 31, R. 33. A substantial number of retailers, who purchase these ponderosa products under trade names which include the phrase "white pine" (e.g. "California White Pine"), sell ponderosa upon orders for "white pine." Par. (f), R. 44. Some retailers make this substitution knowingly (Par. (f), R. 44; Par. 64, R. 40; Par. 65, R. 40; Par. 66, R. 40; Par. 68, R. 41), others do so without understanding that ponderosa is not white pine, though so labelled by the manufacturer, and differs from white pine in important qualities and uses. Par. (f), R. 44; Par. 65, R. 40; Par. 68, R. 41. These sales of ponderosa are directly promoted by the fact that dealers purchase ponderosa products under trade names which include the phrase "white pine." Par. (f), R. 44;

Par. 65, R. 40; Par. 67, R. 41. A further inducement for the substitution of ponderosa upon orders for "white pine" is the lower prices paid by the dealers for ponderosa lumber than for the true white pine. Par. (g), R. 45; Par. 61, R. 39; Par. 69, R. 41; Par. 76, R. 42. On the other hand, there are substantial numbers of producers and dealers in ponderosa who do not describe it as "white pine" but who use some other name such as "Pondosa Pine." Par. 33, R. 34.

(4) The use of the phrase "white pine" in connection with sales of ponderosa products frequently results in the unintentional purchase by retailers, architects, and consumers of ponderosa under orders for "white pine." Pars. (h) (o), R. 45; Par. 41, R. 36; Par. 62, R. 39; Par. 63, R. 39; Pars. 70–72, R. 41; Par. 74, R. 42. Similarly, some architects unknowingly approve ponderosa products when true white pine and the qualities thereof are sought by the buyer and the architect. Pars. (h) (o), R. 45. Thus, ponderosa is unwittingly secured for uses for which it is comparatively lacking in durability. Pars. (h) (k), R. 45; Par. 74, R. 42. Confusion is increased by the fact that ponderosa lumber frequently resembles that of the true white pine in several of the latter's obvious qualities and uses. Par. (j), R. 45; Par. 40, R. 35. As a result, the confusion tends to lower the public estimation of true white pine products (Par. (1), R. 45; Par. 80, R. 43), trade is diverted from competitors selling true white pine products (Par. (m), R. 45;

Par. 75, R. 42; Par. 77, R. 42) as well as from competitors who sell ponderosa products under trade terms which do not include the deceptive and misleading phrase "white pine." Par. (n), R. 45; Par. 75, R. 42; Pars. 78–79, R. 43.

The Commission concluded that respondents' acts "are to the injury and prejudice of the public and are unfair methods of competition in interstate commerce" in violation of the Federal Trade Commission Act (R. 46), and ordered respondents to cease and desist from using the word "white" in connection with the word "pine" to describe forest products made from Pinus ponderosa. (R. 47–48.)

Respondents filed a petition in the Circuit Court of Appeals for the Ninth Circuit praying that the Commission's orders be set aside. (R. 1879–1883.) There were preliminary proceedings with regard to the record on review. (R. 1883–1888.) The matter was argued and submitted, and the Circuit Court of Appeals concluded that the description of ponderosa as "white pine" was not an unfair method of competition nor its suppression in the public interest. The court, admitting that the lumber products were different in kind, determined that difference in quality was material and refused to accept the evidence and findings as to differences in quality and utility but, instead, relied upon certain statements in pamphlets issued by the Bureau of Standards and the Department of Agriculture. The court seems to have failed to consider the evidence in the record and the findings

of the Commission as to confusion and injury to both consumers and the trade and, in addition, seems to have assumed that injury because of price differences was essential and that there was no sufficient evidence to show such injury. Public interest in "conservation of forests" was held to outweigh the public interest in maintaining fair competition; since the court thought that if the use of white pine were maintained the white pine forests would be exhausted. The orders of the Commission were annulled. (R. 1889–1899; 64 F. (2d) 618.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

(1) In reviewing the testimony without reference to the Commission's specific findings of fact, but for the purpose of determining whether the Commission's conclusion that respondents' method of competition is unfair was supported by testimony.

(2) In weighing the evidentiary value of nomenclature approved by the Bureau of Standards.

(3) In holding that the testimony is insufficient to support the Commission's findings that respondents' use of the commercial name California white pine "is an unfair method of competition or that its prevention would be in the interest of the public", without having held that any of the Commission's specific findings were unsupported by substantial evidence, or that the Commission's findings did not support its orders.

(4) In disregarding the provisions of the Federal Trade Commission Act that the Commission's findings of fact shall be conclusive "if supported by testimony."

(5) In holding that the indirect effect of the Commission's order upon the conservation of forests is a relevant consideration in determining whether the proceeding was "to the interest of the public."

(6) In setting aside the cease and desist orders of the Commission.

## SUMMARY OF ARGUMENT

### I

The term "white pine" applied to the products of Pinus ponderosa, admittedly a species of yellow pine, is false and therefore "unfair" under the Trade Commission Act (*Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U.S. 483), despite the "Simplified Practice Recommendation" of the Bureau of Standards which is both inapplicable upon its face and immaterial, and regardless of the comparative qualities of ponderosa since the unfairness of the misdescription is not altered by offering "an exactly similar article or one equally as good" (*Federal Trade Commission* v. *Royal Milling Company*, 288 U.S. 212, 216). (It may be noted, however, that there are admitted differences in the properties or character of the two species of pine, and furthermore not only substantial evi-

dence but the weight of the evidence supports the finding that ponderosa is inferior, as compared with the true white pines, for certain purposes—particularly for exterior uses.)

Length of use of untrue terms is immaterial since misdescription and deception are shown; in any event substantial evidence discloses that confusion and demoralization in the industry and injury to the public has increased and has become important only in the last five years. Similarly, deception being shown, intent to mislead is immaterial (*Federal Trade Commission* v. *Winsted, supra*); moreover, there is ample evidence to disclose improper state of mind.

Competition between "California white pine" products and both true white pine and ponderosa products not labelled as "white" pine is established by the evidence, found by the Commission, and its existence admitted by the court below; accordingly, this case does not fall within the rule of the *Raladam* case, where there was not even "evidence as to the existence of competitors." *Federal Trade Commission* v. *Raladam Co.*, 283 U.S. 643, 653.

## II

Misdescription of the product and misuse of the term "white pine", which is shown to have settled significance in the trade and in the minds of consumers, the practice of substitution of ponderosa products upon orders for "white pine", and the

general confusion and demoralization in the pine industry and trade renders the practice (of using the word "white" to describe the products of ponderosa, a yellow pine) both an "unfair method of competition" and within the "public interest" under the Federal Trade Commission Act. *Federal Trade Commission* v. *Winsted Hosiery Co., supra.* Price differences in the two species of lumber are immaterial, but in any event differences in price are established and are shown to aggravate the unfairness of the situation.

III

The "public interest" requirement is amply sustained by the record. *Federal Trade Commission* v. *Winsted Hosiery Co.,* 258 U.S. 483, 493, 494; *Federal Trade Commission* v. *Raladam Co.,* 283 U.S. 643, 649, 651; *Federal Trade Commission* v. *Klesner,* 280 U.S. 19, 28. The matter of conservation of forests is wholly collateral and immaterial, and even if conservation were pertinent, the record supports the finding and order of the Commission.

IV

The Circuit Court of Appeals exceeded its jurisdiction by making its own independent appraisal of the evidence and disregarding substantial and specific evidence in the record as well as ignoring the findings of the Commission which are "supported by testimony." *Federal Trade Commission*

v. *Pacific States Paper Trade Association*, 273 U.S. 52, 61, 63.

## ARGUMENT

### I

### THE USE OF THE TERM "WHITE PINE" APPLIED TO PINUS PONDEROSA IS FALSE AND IS AN "UNFAIR METHOD OF COMPETITION" UNDER THE FEDERAL TRADE COMMISSION ACT AND DECISIONS OF THIS COURT

The evidence discloses that Pinus ponderosa, from which respondents manufacture forest products, is not "white pine" but is, instead, a species of yellow pine. This is well summarized in the testimony of a professor of forest products in Yale University with twenty years' experience and specialization in classification who testified that Pinus ponderosa "is in the pitch-pine group," the "white pines or soft pines being ordinarily softer, much more uniform in texture and growth, and less highly resinous than the pitch pines and hard pines" and given a sample an expert can tell the differences "very definitely" as between the "yellow pine group" and the "white pine group." (R. 152, 154, 155.) The trade, also, generally testified to the distinction in kind between the yellow and white pines; thus, retailers do not consider "California white pine" as a white pine (R. 97, 92) or a "genuine white pine" (R. 485, 277) but regard it as "in the nature of the yellow pine" (R. 88–89) or "hard pine" (R. 96, 104) and not "the equal" of white pine (R. 504), there being a "difference as between day and night" (R. 297); and architects

and builders testified to the same effect (R. 78 and see *infra,* pp. 24–32). Furthermore, the United States Forest Service has been designating ponderosa "in its timber sales and in its publications" as "western yellow pine" while Idaho white pine (a true white pine) has been designated as "western white pine." (R. 1080.) Even in California "where it grows" the residents refer to ponderosa as "yellow pine" (R. 1152, 1164, 1252, 1258, 1326); a California retail lumberman testified that "nearly all of our customers are recently from the East, and their idea of white pine is based on their experience in the eastern markets of the northern white pine" (R. 1221); some California manufacturers and retailers call ponderosa "pondosa" (R. 1184–1185, 1247) and others retail it as "yellow pine" (R. 1232, 1460) but wholesalers more often misdescribe it as "California white pine" (R. 1234).[3]

In Arizona some producers of ponderosa call it "Western yellow pine" or "Arizona soft pine" (R. 1666). Indeed, respondents admit the difference in kind. As one of their counsel said: "Let me state very definitely that we concede, and we have stated right from the start, that Pinus ponderosa has normally been classified in the so-called yellow pine group * * *" (R. 164); it is not respondents' position that "technologists in lumber or lumber experts had graded * * * Pinus

[3] Even as a description of locality the term "California" white pine is untrue because much of it is produced in southern Oregon (R. 169, 1454, 1522).

ponderosa and placed it into a wrong designation or grade" but that "it was rather unfortunate and misleading that ponderosa pine had been classified in the group of pines which are referred to commonly as hard or pitch pines." (R. 165.) The falsity of the description is generally acknowledged by respondents' witnesses (R. 393, 437, 441–442, 1357) particularly when "white pine" is desired (R. 1358), and it is admitted that a retailer who "shipped California white pine on an order that specified white pine" would be "very much in the wrong" (R. 445).[4]

The Circuit Court of Appeals itself stated that "Pinus ponderosa belongs botanically with the so-called 'yellow pine' group" and that "the only species of true botanical 'white pines' of commercial importance are northern white pine, and two Pacific Coast varieties—Idaho white pine and sugar pine"—and also stated that "in the field of commerce and industry there are but two groups of pine lumbers—the white and the yellow"—which grouping "primarily * * * reflects the industrial utility of the several lumbers". The court thought, however, that this difference between the pines was minimized by some testimony to the effect that "California white pine" falls in the yellow pine group because "it has three long needles

[4] An occasional witness for respondents, however, denies the difference as a practical matter (R. 1447, 1457, 448–458) and one expert even denied the validity of the classification into white and yellow pines (R. 1832).

in each bundle, whereas the white pines have five." (R. 1890, 1892; 64 F. (2d) 618, 620.) But the distinction according to the number of "needles in each bundle" is not strictly true since the number of needles does not always determine the classification of the pines (as one of respondents' own witnesses, a forester and teacher, testified). (R. 1367.) A real difference is, instead, the "cell structure" of the wood (R. 699, 1329, 1633–1634), there being certain cells or projections in yellow pine and ponderosa absent from the white pines (R. 669) which may explain the susceptibility of ponderosa to rot and the differences in durability (R. 1331).[5]

*The "simplified practice recommendation" of the Bureau of Standards*

The court below also believed that the effect of the admitted misdescription was altered by a publication of the Bureau of Standards (Respondents' Exhibit No. 31) entitled, "Lumber—Simplified Practice Recommendation", which listed as "standard commercial names" the various kinds

[5] It is, of course, immaterial that other groupings beside the division into white and yellow pines could be devised (as attempted by respondents' expert witness; R. 1826). One expert witness for respondents did attempt to deny the validity of the classification between white and yellow pines (R. 1819–1845) but the same witness testified that the woods could be distinguished on "histological" or "anatomical" examination (R. 1836). It is also significant that all the wood experts testified that the pines could be distinguished upon either casual or microscopic examination of cell structure.

of pines including "California white pine." This was suggested by a decision of the Circuit Court of Appeals for the Seventh Circuit (*Kirk & Co.* v. *Federal Trade Commission,* 59 F. (2d) 179, 183), but it is unsound for the following reasons:

(1) The publication of the Bureau of Standards does not purport to go into the relation of one trade name to another or to determine the fairness of their use. The Bureau of Standards merely "recommends" a "simplified" commercial practice and does not attempt to prevent deception. In this connection it may be noted that the Bureau of Standards is only interested in "eliminating unnecessary sizes and varieties" and "the division's activities are not mandatory." *National Bureau of Standards—Its Functions and Activities,* Department of Commerce, Circular No. 1, Second Edition, pp. 93, 94. "Simplified practice is a method of eliminating superfluous variety through the voluntary action of an industrial group" and not the Government but a representative of the industry is selected to "ascertain" the "current practice." Furthermore, "the department in no case assumes the prerogative of taking final action in connection with a simplified practice recommendation", for "the Department of Commerce has no 'police powers'" or "regulatory powers with respect to Simplified Practice" and hence "it is highly desirable that this recommendation be kept distinct from any plan or method of governmental regulation or control." "The Department cooperates

only when requested to do so * * *" *The Purpose and Application of Simplified Practice,* National Bureau of Standards, Department of Commerce, July 1, 1931, pp. 2, 7, 10, 17. It is also significant that this same Department of Commerce called conferences which resulted in further units of the industry abandoning the word "white" in the description of products made from ponderosa. (R. 339–340.)

(2) The functions of the Bureau in no way overlap or supersede the functions of trade regulation, and the Bureau is not authorized or empowered to perform the functions of the Federal Trade Commission and determine the fairness of trade names. The statutory functions of the Bureau are the "custody", "comparison" and "construction" of standards, the "testing * * * of standard measuring apparatus", "solution of problems", and the "determination of physical contents and the properties of materials, when such data are of great importance to scientific or manufacturing interests and are not to be obtained of sufficient accuracy elsewhere." C. 872, Sec. 2, 31 Stat. 1449; U.S.C., Title 15, Sec. 272.

(3) The determination (such as it was) of the Bureau of Standards was a matter of conference and tacit approval and not a decision upon the merits after hearing. (R. 1361.)

(4) The admitted practice of another department of government, the United States Forest Serv-

ice, designates ponderosa as western "yellow" pine. (R. 1080.)

(5) The testimony preponderates to the effect that the trade and consumers were misled and confused to their injury (see *infra,* divisions II, III), despite the "simplified practice recommendation" of the Bureau of Standards.

(6) And, finally, the decisions of this Court do not permit such effect to be given findings (if the action of the Bureau of Standards may be called such) made in connection with "quite diverse administrative functions", particularly where "neither the administrative nor the statutory classification has * * * been uniform." The action of another administrative agency "in any event is not controlling * * *." *Piedmont & Northern Ry.* v. *Commission,* 286 U.S. 299, 312. In *Brougham* v. *Blanton Manufacturing Company,* 249 U.S. 495, 499, this Court said of the deceptive use of a trade name that "the test of the product is the meat inspection laws, not the trade-mark laws, and therefore we are concerned with the action of the Department of Agriculture and not with that of the Interior Department."[6]

[6] Thus, the action of a Corporation Commission in granting a charter and approving a name therefor is immaterial upon a bill to enjoin the use of the name. *Standard Oil Co. of New Mexico* v. *Standard Oil Co. of California,* 56 F. (2d) 973, 975. So, too, the action of the Patent Office in approving or disapproving a trade mark or name is immaterial upon a bill to enjoin or upon proceedings to enforce a contrary order of another administrative agency. *Brougham* v. *Blanton*

*Differences between ponderosa and white pine and their comparative qualities and uses*

The term "white" being false technically (*supra*, pp. 15–18) and in popular as well as commercial understanding (*infra*, pp. 42–44) when applied to Pinus ponderosa, it is unnecessary to show further that there is material difference in the quality of the products, for this Court has held that the unfairness of the practice is not altered by offering "an exactly similar article or one equally as good." *Federal Trade Commission* v. *Royal Milling Co.*, 288 U.S. 212, 216 (1933). Nevertheless, the court below assumed that if the lumber sold under some such name as "California white pine" did in fact possess "substantially the same qualities possessed by the white pines of commerce" then there was no unfairness. (R. 1892; 64 F. (2d) at 620.) In

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*Manufacturing Co., supra; Straus* v. *Notaseme Company*, 240 U.S. 179; *Federal Trade Commission* v. *Kay*, 35 F. (2d) 160; *Marietta Mfg. Co.* v. *Federal Trade Commission*, 50 F. (2d) 641. The decision of a single Circuit Court of Appeals (relied upon by the lower court in the case at bar) to the effect that the determination of the Commission is binding "were it not for the action of the Bureau of Standards" (*Kirk & Co.* v. *Federal Trade Commission*, 59 F. (2d) 179, 182) is both unsound and contrary to the prior decision of the same court in refusing to give weight to the approval of a trade mark by the Patent Office (*Federal Trade Commission* v. *Kay*, *supra*). Nor can it be said that the decision in *Federal Trade Commission* v. *Kay* illustrates the applicability of determinations by the Bureau of Standards, because there the Commission itself submitted materials to the Bureau for test and, together with other evidence, received and gave credence to the testimony of a witness from the Bureau.

addition to the fact that such inquiry is expressly immaterial under the decision of this Court, the evidence as to quality and durability, while conflicting to some extent, sustains and greatly preponderates in favor of the findings that ponderosa is inferior to white pine for important purposes. The court below selected only parts of the evidence and disregarded the great mass of testimony.[7]

*Differences in character.*—Regardless of whether white pine or ponderosa is superior in quality, it is generally conceded in the testimony that there are material differences in the lumber products. As one witness testified, the products are "different in color, different in texture" and "there is a very distinct difference in * * * winter and summer wood—there are grain differences." (R. 287.) Ponderosa varies more in its character than

[7] The lower court found doubt in the testimony "viewed in the light of other facts and circumstances." (R. 1894; 64 F. (2d) 618, 620–622.) In addition to the paucity of the evidence examined by the lower court in its opinion, it is to be noted that the bulletin of the Department of Agriculture upon which the court relied treats only of the "mechanical" properties of forest products (R. 774–780, 806–812, 1367–1369) and of the "Strength of North American Woods" for which latter there was "no new basic data" (R. 781), whereas the question is not strength of materials but the different utilities of the white and yellow pines, particularly the superior lasting qualities of white pine when exposed to weather. It is also to be noted that there was an insufficiency of data supporting these publications (R. 792–793), and one of respondents' expert witnesses testified that his experience led him "to believe that the Government's statistics were in error on certain points" (R. 1393).

do the true white pines (R. 152), "some grades" of ponderosa "so far as the organic properties are concerned being like the hard pines * * * and some more like the pitch pines" (R. 158); and there is also greater variation in the wood of a single tree "between the portions of the growth layers" than in the true white pines. (R. 152, 153, 154.) In short, ponderosa being less uniform in character than the white pines, the risk of receiving lumber of different characteristics than those desired is greater than where white pine is secured. (R. 108, 267, 341, 342, 543, 834, 876, 1081–1083, 1141, 1145, 1153, 1180, 1321, 1328–1329, 1455, 1696–1697.)

*Differences in quality and utility.*—Not only are there differences in the products, but the evidence supports the Commission's findings that ponderosa is actually inferior for important purposes and "more subject to shrinkage and warping * * * and more difficult to work than any of the members of the white-pine group" (Par. 10, R. 30) and "true white pine lumber is far more durable than ponderosa lumber, especially when exposed to weather conditions" (Par. 40, R. 35).[8] To illustrate, a specialist in wood classification testified that the more uniform white pines, including the western true white pines, are noted for their quality of staying "in place" and do "not shrink much or swell much." (R. 156.) A Detroit manufacturer of doors and screens testified that

[8] See also the findings of the Commission: Par. 8, R. 29; Par. 43, R. 36; Par. 44, R. 36; Par. 54, R. 37; Par. 55, R. 38; Par. 56, R. 38; Par. 57, R. 38.

"California white pine" is regarded as "inferior" in that "it does not stay good, does not mill as well, and does not hold paint so well, does not work up so clear." (R. 515.) A Brooklyn retailer testified that "California white pine", which was "coming into vogue", is not "equal to the Idaho white pine in its quality" since the latter is "softer and it will stand up better; it won't warp and twist, such as California white will." (R. 253.) Another retailer testified that "if a man wants good pine, if he asks for good pine, he does not want California white pine, because it does not work up and it is not as soft a pine, and it does not answer the purposes for a good job" because "it is apt to twist, warp, and it has this heavy grain which is apt to show through paint" and "will not last as genuine white pine." (R. 275–276.) A manufacturer testified that he was induced by "Pacific Coast people" to try ponderosa under the name of "California white pine" but that in following this suggestion he "did not fare so well; it did not stand up so good" but he continued to use it anyway though he knew that true white pine was better "on account of the texture" since "it does not twist or warp as bad as the others" and has greater lasting qualities. (R. 259–263.) Similar testimony was given by numerous wholesalers, retailers, manufacturers, and a lumber grader (R. 572–573, 543, 390, 291–293, 904, 1259, 980, 1250–1251, 1278), by a member of the staff of the United States Forest Products Laboratory (R. 816–817, 821), by the

supervisor of the Sierra National Forest (R. 1264), and by the former chief of the United States Forest Reserves (R. 1081, 1090).[9]

In addition to its greater variation in character and quality, the inferiority of ponderosa in several particulars and for certain purposes is set forth in the testimony in the following respects:

*Sapwood and heartwood.*—The sapwood of any species of tree is inferior in durability to the "heartwood" (R. 156) and ponderosa runs more to sapwood than to heartwood in comparison with the true white pines. (R. 153, 154.) A lumber executive of 40 years' experience testified that ponderosa "runs much heavier to sap than this white pine" and to increase the confusion "the sapwood of pondosa pine is almost equal in appearance" to the heartwood of white pine. (R. 115.) A Minnesota manufacturer testified that "the big reason we prefer" white pine "is that it is obtainable practically free from sap" while it is not "feasible to make frames from the ponderosa tree, confining yourself to heartwood." (R. 326.) A manager of

[9] A wholesaler who was a witness for respondents testified that "for common boards Idaho white pine is superior to California white pine" because "the knot is sounder; the tree produces smaller, sounder knots" and Idaho white pine is recommended "to stay in place rather than California" where "exposed to heat and cold, as any wood would be exposed, no matter what it is used for" (R. 443). Of course, some of respondents' witnesses denied the superiority of the true white pines. (R. 134–135, 1417, 1418, 1444, 1453, 1485, 1490, 1527, 1550, 1573, 1592, 1612, 1809–1810.)

one of the respondent companies identified a piece of lumber from his plant as "all sap" and "a typical specimen of Pinus ponderosa" of "the very highest type" and "the highest grade." (R. 448–449, 450.) It was also shown that in manufacturing sash and frames from white pine the sapwood could be turned in so as not to be exposed to the weather. (R. 175, 199, 200, 215–217. It was also disclosed that inquirers of the Government Forest Products Laboratory are advised that "the heartwood of the white pine has more decay resistance, will give longer service under conditions favoring decay than the heartwood of Pinus ponderosa" and "the mill run of the white pine probably would average higher in durability under decay-producing conditions than the mill run of Pinus ponderosa, because we believe the mill run of the white pine has a lower percentage of sapwood than the mill run of Pinus ponderosa." (R. 821.)[10]

*Hardness.*—Ponderosa was also shown to differ in "hardness and evenness of the grain" (R. 78–79), being "very much harder than the heartwood of

[10] This was the testimony of manufacturers (R. 1003, 1249, 1278, 670), salesmen (R. 412, 1320, 1325), retailers (R. 1230), respondents' witness (R. 1556), lumbermen (R. 986–990), a lumber grader (R. 1211), a United States Forest Service inspector (R. 1153–1157), a supervisor of the Sierra National Forest (R. 1266), and members of the staff of the United States Forest Products Laboratory (R. 763, 795–801, 821). An occasional witness for respondents testified to the contrary. (R. 435, 1375, 1419, 1801.)

white pine" (R. 115), "more apt to check and split" than the clear white pines (R. 97) and "not satisfactory to the customers" because it is "too hard" (R. 51).

*Resin.*—Again, ponderosa was shown to be resinous and more "pitchy" as compared with white pines (R. 1603, 1650, 1210), to such an extent that experiments were conducted to discover whether turpentine could be produced from ponderosa (R. 968). An architect testified that "California white pine discolors." (R. 512.)

*Paintability.*—A Chicago retailer testified that "undoubtedly" white pine stands up better "without paint" than "California white pine." (R. 613.) In addition, ponderosa is inferior in "paintability" according to the testimony of one of the staff of the United States Forest Products Laboratory. (R. 802–805.)

*Susceptibility to rot.*—As a result of these characteristics of ponderosa, it is more susceptible to rot than the white pines. (R. 1168, 1221–1223, 1248, 1258, 1319.) Consequently, the true white pines are much preferable for exterior uses. An architect and architectural editor testified that "California white pine" is not "a satisfactory substitute for genuine white pine to use in exterior of a building, in any way, shape, or form" though it is "reasonably satisfactory for interior purposes" because California white pine "disintegrates and has a life of from three to five to seven years whereas the life of a white pine is still to be noted" and

true white pine lumber, on the other hand, "is still alive in all cases * * * examined" so that among architects "for durability and general utility for exterior finish" true white pine "is the wood preeminent." (R. 307, 308, 311.) A Boston lumber dealer testified that white pine was the "best wood for outside" and California white pine was "never" recommended because it would not "stand so well under the weather" but would "check and split quicker and then it will commence to get a little decayed" and "will rot quicker than the other pines." (R. 104–105.) A Detroit lumber wholesaler and retailer testified that "real white pine" is "most assuredly" better "for exterior purposes" because "it does not rot as soon in this climate" as shown by experience whereas "ponderosa" had "rotted in two or three years." (R. 467.) New York dealers testified that Idaho white pine "would stand the weather better" than California white pine and that either California white pine or "ponderosa" were good for interior work "exclusively." (R. 283, 287.) A Minnesota manufacturer said that "the genuine white pine is less prone to split and warp, which are points in its favor for exposed work" (R. 326), and the testimony of manufacturers (R. 1181–1183, 1276), wholesalers (R. 379–380), architects (R. 206–208, 741), retailers (R. 650–651, 659–660, 733, 750) and of one of respondents' witnesses (R. 406) was to the same effect. The truth of this conclusion is illustrated by

testimony regarding the white pine used in colonial structures which are still standing in the Atlantic States as well as by testimony regarding old structures in California.[11]

*Frequent replacement of ponderosa.*—On the other hand, it was shown that exteriors made from ponderosa soon decayed and had to be replaced. Thus, a lumber dealer testified that his experience had shown that ponderosa "rotted in two or three years and we had to replace it" (R. 467), another testified that when "pondosa" was used for ex-

[11] Thus, Christ Church built in 1761 and the old houses in Cambridge, such as the Longfellow house, are all of white pine and in "excellent condition", with very little replacement if any (R. 58–63). So, too, the Fairbanks house, built in 1636 and said to be the "oldest frame structure now standing in the United States, had not had the exterior replaced until about 40 years ago and had never been painted" (R. 66–67). The same testimony was given as to other structures in New England (R. 69–71, 143–149). The white pine from which these houses were built was said to be "much the same, clear and free from knots" as the Idaho and other white pines of today (R. 65, 182, 648) if indeed the latter were not better than the older eastern white pine (R. 84). Old structures in California built of sugar (white) pine also survive (R. 1165–1167, 1313–1318). On the other hand, more recent structures built of ponderosa or so-called California white pine were found to have begun to rot in a comparatively few years, such as the "Towne house" in Connecticut, built in 1914, and a house in Georgia (R. 222–227).

In rebuttal, respondents offered evidence of the lasting qualities of ponderosa in New Mexico (R. 1693–1781) and in the interiors of the ancient Hopi structures (R. 1688–1692), but evidence of structures in places of altitude and dryness is immaterial because there the lack of humidity "has a tendency to preserve wood" (R. 1710).

teriors, or doors or sash he had to take it out "and replace that with northern pine" whereas "Idaho white pine" and other true pines were "durable for uses where exposed to the weather" (R. 472–475), another testified that in his own house ponderosa "rotted out in five years" but he nevertheless continued to sell "pondosa pine as white pine on orders for white pine" for exterior use because the true white pines were "higher in price" (R. 528–529), and another testified that "pondosa and California white pine" in numerous cases had "rotted out under the paint and siding in cornice lumber" disclosing that Idaho white pine was "undoubtedly" the "more durable" of the western pines (R. 599). A wood technologist testified that of cases of wood sent to him for analysis he had had "more cases of Pinus ponderosa than any other" showing "failure when exposed to the weather" and discoloration. (R. 157.) This was the general line of testimony by dealers and owners. (R. 487–489, 661–662, 700–703, 609–610.) For the same reasons true white pine, such as Idaho white pine, is preferred for sash and trim, as shown by the testimony of dealers (R. 467, 1220, 1229), a staff member of the United States Forest Products Laboratory (R. 761–762), the former chief of the United States Forest Reserves (R. 1084–1085), a San Francisco architect (R. 1158–1160) and others. And white pine, particularly Idaho white pine or sugar (white) pine, is demanded for the exacting uses of pattern work (R. 648–649, 52, 101–102,

347–348, 522–523, 557, 558, 874, 1356, 1359, 1700), as illustrated by the testimony of a sales representative of one of the respondents below (R. 436), the former chief of the United States Forest Reserves (R. 1093), and witnesses for respondents (R. 1425, 1553) though an occasional witness flatly denied the fact (R. 1371, 1057 but see 1065).

*Usage, intent and purpose*

Respondents in these proceedings have insisted that the labelling of ponderosa as "white pine" is innocent and without intent or purpose to injure competitors or mislead the public. Intent to mislead is not enumerated in those decisions of this Court dealing with the essentials in misdescription cases. Furthermore, this proceeding is not brought by private parties but by a governmental agency—it is brought "in the interest of the public", who are unconcerned with respondents' motives. Respondents are presumed to have intended the necessary consequences of their acts, shown to be false, misleading, confusing and injurious.[12] There is, also, ample testimony to show improper motive as

[12] See, for example: *Straus* v. *Notaseme Company*, 240 U.S. 179, 180–182; *Addyston Pipe and Steel Co.* v. *United States*, 175 U.S. 211, 243; *United States* v. *Patten*, 226 U.S. 525, 543.

*Juvenile Shoe Company* v. *Federal Trade Commission*, 289 Fed. 57, 59, certiorari denied, 263 U.S. 705; *Royal Baking Powder Company* v. *Federal Trade Commission*, 281 Fed. 744, 752; *Indiana Quartered Oak* v. *Federal Trade Commission*, 26 F. (2d) 340, 342; *Federal Trade Commission* v. *Balme*, 23 F. (2d) 615, 621, certiorari denied, 277 U.S. 598.

well as deliberate deception. The state of mind of the trade in passing off ponderosa, aided by the various labels including the word "white", is illustrated throughout the record in such statements as that wholesalers are "not in a position to prevent" substitution by retailers (R. 194), that "the lumber dealer is not particularly interested in the durability of the lumber * * * his customers are supposed to know what they want and all that he is in business for is to give them what they want" and the trade is not "particularly interested as to whether it is genuine white pine or not" (R. 282, 283), that the "speculative" trade is "not particularly interested in the longevity of the wood" but is "more interested in a smooth, good-appearing lumber at a low price" (R. 493) and "speculators don't care what it is" (R. 300), and that retailers sell ponderosa since "carpenters, manufacturers and architects" ordinarily "don't know the difference" (R. 234, 235). The wholesaler or manufacturer "cuts out of the bill of lading the name and the origin of the shipping point" and insists that "the Interstate Commerce Commission allows" this, so that retailers "can never establish the fact" (R. 232). In soliciting, the California people "did not use the term 'true' but they called it white pine" (R. 258–259), or represented it as "genuine white pine" (R. 243), and "showed" retailers "inducements" (R. 258–259). Another retailer testified that he ordered white pine "stamped as genuine white pine" only "where it goes up in its original board" and can

be seen. (R. 552.) The president of one of the respondent companies having the largest production of "California white pine" admitted that the use of the term "has a monetary advantage" to respondents "because it classifies our woods with the other woods that have been known to the trade, including itself, as white pine." (R. 1551–1552, 918–919.) It is also represented in selling ponderosa that "genuine white pine was gone" (R. 499, 563), whereas supply in commercial quantities is established both by statistics and the testimony of experts (see *infra*, page 66); and the desire of retailers to stock with only one kind of pine served "to build up the myth that there was no more white pine" (R. 305). Regardless of original purpose, present intent is demonstrated in the record (R. 1457–1458, 1542).

The court below did not consider intent an essential factor but it did mention that ponderosa was called "white pine" in order to avoid identification with the "yellow pines" of the South. However, California manufacturers cannot, in avoiding classification with southern yellow pine, falsely assume identity with northern white pine. Ponderosa, in addition to being a yellow pine, may be said to be more nearly like Arkansas soft (yellow) pine than anything else, as disclosed, for example, in the testimony of the former Chief of the United States Forest Reserves (R. 1082; see also 124–125, 155, 116); it is an intermediate wood between the true white pine and southern yellow pine (R. 104, 1082).

The court also mentioned that since 1915 ponderosa has been marketed nationally as "white pine." However, California "white" pine has been in general use just long enough to disclose the differences in quality and utility. As a Detroit architect testified, the "market condition of pine is one that we are just beginning to appreciate" (R. 525). Despite the fact that, upon earlier investigation by the Commission, about half the ponderosa producers agreed in 1924 to call their product "pondosa pine", the confused market condition has become pronounced since that time.[13] In any event, this Court has determined that "the fact

[13] For example, an architect testified that the trouble in terminology arose "three years ago" (R. 536), another said that "lately" there was "great confusion as to what white pine is" (R. 644), a Minnesota manufacturer had used California white pine "four years", and a Wisconsin retailer had handled California white pine "just in the past two or three years" (R. 737) and another "about five years" (R. 749), a New York retailer testified that California white pine had been on the market as such "about five or six years" (R. 237) and another said "not over five years" (R. 279), a Chicago retailer testified that substitutions of California white pine upon orders for "white pine" had been a practice "within the last four or five years" (R. 625) and another witness said that it had been a practice only during the last five or ten years (R. 72, 76), and it was said that California white pine had been known in New England for "five or six years" (R. 92), while a distributor of lumber products throughout the region from the Great Lakes eastward testified that he had only known California white pine for "probably ten years" (R. 440), and one of the largest retailers in Chicago testified that the billing and labelling of pine by western manufacturers "has changed so in the past five years" that it is impossible to say generally just how shipments are represented (R. 621).

that misrepresentation and misdescription have become * * * common" is immaterial, because "a method inherently unfair does not cease to be so because those competed against have become aware of the wrongful practice." *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U.S. 483, 493–494. This Court will recall that long usage was argued in the *Royal Milling* case, but the argument did not prevail there any more than it did ten years earlier in the *Winsted* case, or in other cases.[14]

*The element of competition*

The testimony discloses keen competition. Not only do the producers of true white pine lumber products lose business to the producers of "California white pine" but also those producers of ponderosa who, instead of misdescribing their products, use some trade name such as "pondosa pine" find themselves at a disadvantage in competition when the same lumber is offered by competitors as California "white" pine. The testimony in this respect is substantial and specific, and is illustrated under II and III, and in note 17, as well as by the following: A lumber salesman representing a marketing company for the products of a large group of producers testified that, among the

[14] The length of use of the term "Creamo" was held not to be determinative of the company's right to continue it, nor was the large investment in the name determinative. *Brougham* v. *Blanton Manufacturing Company*, 249 U.S. 495. Mere lapse of time is no defense. *Heger Products Co.* v. *Polk Miller Products Corp.*, 47 F. (2d) 966, 967; *Harvey* v. *American Coal Co.*, 50 F. (2d) 832, 834–6.

reasons why he lost sales "to manufacturers of California white pine", were the following:

> * * * In some cases price. Other cases we have some of the dealers who feel that the California white pine is better than our pondosa pine; we also have cases where some other dealers demand it because it is called white pine and they feel that they can pass it on to their customers with clear conscience as a white pine.

"* * * Some absolutely demand it over pondosa. They think * * * that it is better, and others on account of its being called white pine." (R. 201.) A sales agent in New York, New Jersey, and New England who handled both ponderosa and white pine, selling the former as "pondosa" pine only, though other dealers sold it as "white pine", testified that—

> there is another class of dealers that tell me that they know that California white pine is not a true white pine, but it is invoiced to them as white pine and they sell it to the trade requiring white pine as white pine and because it is invoiced to them as white pine, they can pass it on as white pine and do it with just a little safer feeling than they would if it was invoiced as something else besides white pine, and buy it at considerable less than they would have to pay for true white pine.

(R. 178, 179, 180.) A large manufacturer of sash testified that California white pine was furnished

for exterior trim "only just when we find that the competition demands that we furnish that." (R. 658.)[15]

Since the evidence and findings establish the existence of competition between "California white pine" products and those made either from true white pine or from ponderosa not labeled as "white" pine, this case does not fall within the *Raladam* case where there was not even "evidence as to the existence of competitors." *Federal Trade Commission* v. *Raladam Co.*, 283 U.S. 643, 653. The evidence relating to competition is interwoven with the subjects of confusion, substitution or "passing off", and injury to the trade and public, which are treated in the following divisions of this brief.

## II

### THE MISDESCRIPTION IS MISLEADING AND CONFUSING TO BOTH THE CONSUMERS AND THE TRADE, AND THIS RENDERS THE PRACTICE BOTH AN "UNFAIR METHOD OF COMPETITION" AND WITHIN THE "PUBLIC INTEREST" UNDER THE TRADE COMMISSION ACT

Where both consumers and buyers for retailers and sales people are misled by misdescription, "it

[15] To the same effect is the testimony of lumber salesmen (R. 209–210, 984–986), manufacturers and their representatives (R. 348, 399–400, 847, 852–3, 855, 867, 876–877, 882–884, 898, 916, 1187, 1278–1279, 1326–1327), retailers (R. 246, 650), and witnesses for respondents (R. 1107, 1436, 1485, 1525, 1571), though some of respondents' witnesses denied the existence of competition (R. 435–436, 1055, 1099, 1462, 1562, 1566, 1571, 1584, 1612).

is to the interest of the public that a proceeding to stop the practice be brought" and these same facts "show also that the practice constitutes an unfair method of competition * * *" *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U.S. 483, 493.

Misdescription in the face of settled and generally accepted nomenclature, substitution or "passing off" of products, and resulting confusion is overwhelmingly shown in the record (*infra*, pp. 42–56); yet the court below sought to dispose of the evidence by arguments in mitigation of selected parts of the testimony of expert witnesses only. An architect of twenty-five years' practice in New York, specializing in high-grade residential work, testified that "there is a great deal of confusion in the pine market due to the terminology, and some of the confusion is quite honest. * * * I know that California white pine connotes to some people a distinct type of wood, but it connotes to other people, white pine in general, and therein lies the confusion." The witness also testified that those who were confused, generally speaking, were the "millmen and the lumber dealers, as well as the architects." The court below, after quoting this testimony, said it could not see "just why architects and lumber dealers should be confused in view of the aid and assistance furnished by the Government through the Bureau of Standards" and the court "assumed that architects have a general knowledge of the qualities of the various materials they

specify." (R. 1895; 64 F. (2d) 622.) The inapplicability of the "simplified practice recommendation" of the Bureau of Standards has been treated above, and the court's "assumption" contrary to the evidence and findings, that the trade has knowledge, is beyond the powers of the court under the Act. Furthermore, "the fact that misrepresentation and misdescription have become so common * * * that most dealers no longer accept labels at their face value, does not prevent their use being an unfair method of competition" and "a method inherently unfair does not cease to be so because those competed against have become aware of the wrongful practice" nor "does it cease to be unfair because the falsity of the manufacturer's representation has become so well known to the trade that dealers * * * are no longer deceived." *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U.S. 483, 493–494. Notwithstanding this clear rule, the court below held that the very prevalence of the practice of substituting or "passing off" the lower-priced product demonstrated that "it is not apparent that an affirmance of the Commission's orders would afford any relief if injury from such manufacture in fact occurs."

The court below also concluded that it did "not appear" that "a practice prevailed of charging a price [for "California white pine"] on a basis of the market price for Northern or Idaho White Pine," and therefore, no injury was shown. In answer to testimony that producers of white pine

had to bring their prices down because of the competition by manufacturers who misdescribed ponderosa, the court below said that the reduction "did not occur until three years after the commercial name of half of the Ponderosa of commerce was changed from Western White Pine to Ponderosa", but it later stated that, despite the competition with manufacturers of ponderosa, "for more than fifteen years prior to the institution of this proceeding the so-called true white pines were able to command a higher price." (R. 1895, 1896, 1898; 64 F. (2d) at 623, 622–623, 624.) There are inconsistencies in these statements of the court on relative prices. The court disregarded the admitted and overwhelming evidence of differences in price which were shown to aggravate the situation (see *infra*, pp. 50–52). In any event the matter of price is immaterial in this type of proceeding, for it is the unfair diversion of trade and misrepresentation to consumers that is the gist of the matter. The point is that "if consumers or dealers prefer to purchase a given article * * * they have a right to do so" and "the result of respondents' act is that such purchasers are deceived into purchasing an article which they do not wish or intend to buy, and which they might or might not buy if correctly informed as to its origin" for "the purchasing public is entitled to be protected against that species of deception, and * * * its interest in such protection is specific and substantial." *Federal Trade Commission* v. *Royal*

*Milling Co.*, 288 U.S. 212, 216–217 (1933). (In the *Royal Milling* case it may be noted that the court below "failing to see any * * * financial loss in the methods of competition," found that "no public interest exists" (58 F. (2d) 581 at 583); but this Court reversed the decision).

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The evidence on (1) the generally accepted terminology for lumber products, (2) the substitution of different products for those specified, and (3) the resulting confusion is vital in this type of proceeding; it is more than ample in the case at bar to support the findings of the Commission and may be summarized as follows:

(1) *"White" pine is an accepted and settled term in the building and lumber trades meaning "true" or "genuine" white pine and has similar significance for the consumer as well*

Architects from every part of the country testified that they specified "white pine", expecting to secure the true white pine, and had to rely upon dealers and contractors to get it for them: Thus an architect and architectural publisher and editor testified that the term "white pine" has not "lost its significance" but instead "means everything to the architect who has had any experience in building" (R. 304), and consequently architects specify simply "white pine" (R. 303, 316), of which California white pine is not a species (R. 317), and have no way of checking up on materials actually fur-

nished. (R. 303, 304, 312–313, 314–315.) For exteriors Cass Gilbert specifies "clear white pine" but has no way of checking on the product furnished except by inspection. (R. 238, 239.) Other architects testified that "white pine" has not "lost its significance" and that real meaning is attached to "genuine white pine" (R. 333, 334), that the term "white pine" has peculiar significance and "California white pine" is not a "fulfillment" of orders or specifications (R. 335), that they always "say merely white pine" (R. 499, 500), and "architects don't specify a certain material, they specify a white pine or yellow or spruce." (R. 535, 536.) This was the testimony of other experienced architects. (R. 195–196, 615, 682, 688, 722, 757.) To the same effect is the testimony of wholesalers, retailers and other lumbermen: Thus a dealer testified that the public "as a rule" asks for "white pine" and never for "California white pine" and that while either "pondosa" or "California white pine" could properly be furnished upon orders for ponderosa pine products, these could not properly be substituted for Idaho white pine, and that California white pine has not come to be accepted as a "white pine" among lumber dealers "although there are a class of lumber dealers who do not seem to know the difference and don't care." (R. 292.) Another testified that architects and builders "very often" specify "white pine" and properly are given "strobus, Idaho or sugar" pine but never

"California white pine" or pondosa since the latter are usable only for interiors and "are of less value for making doors and so forth" because "they stain more easily and pull out of shape more easily, and they are of harder texture". (R. 256.) Other dealers testified that the term "white pine" retains significance "in the lumber industry at the present time" (R. 340), that the public "as a rule" asked for "white pine" and should be given Idaho white pine but never pondosa "on that order" (R. 288), that "in the specification for lumber" the "customers on occasion ask for white pine" and the retailers "know the distinction" since "it is easily visible to anyone who knows and has had experience" (R. 293–296), that "builders, contractors, and the like" ordinarily "ask for white pine" because "that is all they know about it * * *" (R. 298), that "when somebody asks for genuine white pine" he "means either Idaho white pine or northern white pine" (R. 213), that "white pine" has not lost its "original specific signification" with the advent of the various trade names (R. 189), and that calls are received "every day" for simply "white pine" and they do not regard "California or Arizona white pine as real white pine" (R. 472.) This was the testimony of other members of the trade (R. 193, 679–680, 691, 731, 732, 749, 1087), though some of respondents' witnesses sought to give evidence to the contrary (R. 375, 387, 414, 417, 430, 1464, 1809).

(2) *As a result of the use of trade names such as California or Arizona "white" pine, ponderosa products are furnished upon orders for "white pine", the substitution being aided by similarity in nomenclature and appearance of the woods and induced by differences in price and the tendency of dealers to stock only one kind of pine*

A wholesaler who purchased lumber throughout the country testified that he sold all of his pine as "white pine" and filled orders for "white pine" with California white pine, though he knew the difference and did "not consider that as white pine" (R. 86, 87, 88); and this was the testimony of producers and their sales representatives. (R. 1001, 1066–1067, 1102, 1184.) Moreover, retailers in purchasing from wholesalers, cannot tell where the lumber comes from because, as already shown above, the wholesaler "cuts out of the bill of lading the name and the origin of the shipping point" and the railroads "say that the Interstate Commerce Commission allows them to erase the name of the company and the shipping point, so we can never establish the fact" (R. 232), the result being that retailers order "white pine" from manufacturers and take what is sent them (R. 589) and pass it on to the trade as "white pine" though they know or suspect it to be California white pine and not satisfactory for exteriors (R. 593, 594). Flagrant substitution was shown to be the practice: Thus, a mill-

man testified that ponderosa is sold "every day" upon orders for "white pine". (R. 487.) Retailers generally testified: that although they did "not think it is white" they would furnish California white pine upon orders for "white pine" and would "regard that as compliance with the specifications" because they "buy it as such" (R. 750); that customers "practically all ask for white pine" and are supplied with "California white pine under any of those orders" because the latter was kept in stock "principally as a matter of price" (R. 577–578); that yards got "a good many orders" for "white pine" and filled them with ponderosa or California white pine as a general practice "within the last four or five years" (R. 625); that lumber yards received "orders calling for white pine without a further specification or description" and felt free to fill them with Idaho white pine or California white pine or pondosa "without necessarily explaining" (R. 633); that "the building trade" asks "for white pine without any specification" and "we give them pondosa" or California white pine (R. 637); that there was "about ninety-five percent" substitution on orders for white pine (R. 650); that California white pine is used "interchangeably with the Idaho" (R. 298–301); that "the average person as a rule orders white pine" and is given Idaho white pine or California white pine as the retailer deems expedient and happens

to have lumber in stock because "carpenters, manufacturers and architects" don't "know the difference as a rule" (R. 234, 235); that the trade is in the habit of "delivering to customers California white pine when the said customer has ordered white pine" (R. 277, 278); that "if anybody comes in and asks for white pine he may receive Idaho white pine or California white pine" (R. 291); and that customers usually ask for "white pine" and are sometimes given "Arizona white pine" purchased from one of respondents (R. 461–464.) Substitution was no less rife among manufacturers, other than producers of lumber: Thus, a grader in a millwork concern testified that upon orders for "just white pine" California white pine was furnished to retailers, builders and consumers. (R. 176.) (Specific instances of substitution also appear in the record.)[16] This is the run of the testimony of other retailers, manufac-

[16] For example, a Detroit architect related an incident of substitution in the "Detroit Community Fund Building". The wood was tested by a man from the United States Forest Products Laboratory who "reported that the sash there were not white pine, and that they were yellow pine, mostly pondosa" though he would not put his report in writing because he said he was "supposed to be 'neutral'" (R. 536–538). In another case, a sash and door manufacturer had ordered "sash white pine" but was given ponderosa by the wholesaler. Architects "would not accept it" and he "had a run-in with the State of New York, and after a six-months' fight" he "took it that Pinus strobus means white pine" and also learned the meaning of ponderosa. (R. 261; see also R. 309–310.)

turers' salesmen, and architects (R. 51, 54, 71–76, 510, 599, 267–268, 272, 679–680, 685, 733, 738, 749–750, 1001, 1184), even of the representatives of respondent companies and of respondents' own witnesses (R. 1066–1067, 1102, 1113–1115). It is interesting to note that one of the largest manufacturers of sash, who was a most positive witness for respondents, admitted that he made all his products from ponderosa though he sold them under the name "*White* Pine Sash Company" (italics ours) (R. 1066–1068). The substitution is, of course, aided directly by the term "white" pine: Thus, an executive officer of one of the larger companies testified that he thought the misdescription "had a tendency to have the products of ponderosa used under a misapprehension that they [customers] are getting white pine" (R. 38) and even an eastern sales representative of one of the respondents admitted upon cross examination that the term "white" as applied to ponderosa products is misleading to some at least (R. 439). Substitution is aided by the following:

*Similarity in appearance.*—The superficial similarity in appearance between some of the products of ponderosa and of true white pine aids in the substitution of the former upon orders for "white pine": The manager of one of the respondent companies testified that "some specimens of these various lumbers" are "so similar in appearance as to make it difficult in some instances to identify

them" (R. 448). Architects generally testified that they could not tell the difference between the woods but had to rely upon the contractors (R. 74, 75, 80–81) and even where they had reason to believe that something else has been furnished they used it anyway "from time to time" because they do "not have time to change." (R. 220.) The owner of a retail lumber chain testified that among architects not "one out of a dozen can tell the difference between pondosa pine, genuine white pine, or Arizona white pine" and "there isn't any of them, half of them can't tell the difference between yellow pine and white pine" and when they ask for "white pine" we "give them what we have" which "might be Arizona or Idaho or northern white pine" or "California white pine if * * * in stock", that this was done, moreover, despite the fact that the "white pines" were "most durable for outside weather" and the California pine "rots out much quicker" and "the sash that is made of pondosa pine frequently comes back to us in six or seven years for new bottom rail, which indicates that they are rotting out" (R. 546–547).

*Lower price of ponderosa.*—The lower price at which so-called California or Arizona "white" pine is sold both aids in the substitution of this lumber upon orders for "white pine" and adds to the injury to competitors who produce genuine white pine or who produce ponderosa but do not misdescribe it. Salesmen and millmen testified that retailers make the substitution "because it is more profit to them" (R. 180, 184), that "in some cases

price" resulted in the loss of sales in favor of "manufacturers of California white pine" (R. 201), and that the species was furnished according to the price the customer was willing to pay (R. 240–241). A wholesaler testified that his customers (retailers) insisted upon ponderosa, though in the name of "white pine", because of the differences in price. (R. 212–213.) The retailers themselves generally admitted that price determined what would be furnished (R. 505), that "it is a question considerably of price" (R. 284), that California white pine had "only been handled by us because of economic necessity of getting the price down" (R. 279), that "to the small trade" it is "a matter of price, which is the cheapest" (R. 295), and that the dealer does not "care as to the durability—all he knows is he pays more for his Idaho pine than he will pay for his California pine". (R. 296.) The "speculative trade" will "accept most anything that is cheap" (R. 250–251, 292). The relation of price differences to competition is specifically shown: Thus, the trade testified that they must furnish "ponderosa pine upon orders that call for white pine" because "competitors do, and we have only to meet the price, we have to buy cheap, cheap lumber, in order to meet the price" (R. 488, 489), that "if I can sell California pine * * * then I buy that because it is four or five dollars a thousand cheaper" (R. 550), that they are "only interested" in pine upon which they "can make the most money" (R. 1461), that ponderosa was labelled to include the word "white" pine "merely for sales purposes—to

get a little better price" (R. 1695), and that the word "white" had a "monetary advantage" (R. 1551) or "a monetary value" and is "worth about two dollars a thousand". (R. 1281.) Even respondents' witnesses testified that the word "white" had a "monetary advantage" (R. 1551), that "it is entirely a question of price" (R. 411), and that California white pine "is a little cheaper" (R. 430). Even the Forest Service prices are higher for sugar (white) pine (R. 1155). This was the run of the testimony of manufacturers (R. 530–532, 325, 847, 848, 867, 877–879, 885, 898, 1005–1007, 1678), retailers (R. 578, 581, 594, 648, 649–650, 686, 735) and architects (R. 306, 682) generally, as well as of manufacturers, retailers, and architects who were witnesses for respondents. (R. 1054, 1109, 1118, 1576, 1724, 1818.) It is to be noted that respondents claimed that the differences in cost of production were immaterial and "not a proper matter of inquiry." (R. 112, 113, 368.)

*Tendency to stock only the cheaper ponderosa.*— "As a matter of price" (R. 577–578, 235) and also because dealers seem to desire to stock only one kind of pine, the cheaper ponderosa (under its various labels) is more often carried by the smaller dealers, and upon orders for "white pine" some brand of ponderosa is supplied. An architect and architectural editor testified that the desire of retailers to stock with only one species "served to build up the myth that there was no more white pine" and moved dealers to pass off California white pine which they "get elsewhere at cheaper

prices"; and because of the press of time and necessity for architects to take what they could get quickly the retailers got far with their substitutions. (R. 305, 313.) Another architect testified that "we are dependent a little bit on the mills" and "we follow the course of least resistance" and "specify and expect what they give us" which "helps us a little bit." (R. 758.) Retailers testified that the stock on hand determines what is given the customer (R. 299, 258, 129, 133, 426, 607), and the representative of one of respondent manufacturers testified that "it is usually a case of what the dealer has is what the fellow gets" as between "Idaho, pondosa, or California." (R. 410.)

(3) *Disregard of the settled term "white pine" and substitution of products has resulted in confusion and demoralization in the building trades*

Demoralization in the pine industry, as a result of the confusion of terms from indiscriminate use of the word "white" to describe ponderosa, is shown in the evidence of architects, manufacturers, and the trade: Thus, architects testified that "there is such confusion on it, the white pine is claimed to be of certain quality, but one branch of the lumber industry denies it and another branch recommends it" that "we are simply at sea on the whole white-pine situation" (R. 499); that there is "a great deal of confusion" (R. 524); that though "white pine" is specified for "exterior work usually" nevertheless "great confusion as to what white pine is" has existed "lately" (R. 644–645);

that there is "a great deal of confusion in the pine market due to the terminology" because an architect deals with three persons—"the lumber producer, the lumber merchant or millman; and the contractor"—and since "especially those in smaller lines of business" say their lumber was sold to them "as white pine" in "this day * * * California white pine connotes to some people a distinct type of wood, * * * it connotes to other people white pine in general and therein lies the confusion" on the part of "the millmen and the lumber dealers as well as architects" (R. 267, 272); that the term "white pine" is becoming "ambiguous" and "at the present time you get a lot of things that we did not use to mean by it" and even upon more technical specifications "very often we don't get it" (R. 231); that "there is confusion in the minds of the architect, as regards" the various pines which "results in the fact that the architect thinks that California white pine is a true white pine and until he is informed of his mistake he is still in ignorance of that" (R. 312). This confusion is increased since architects simply specify "white pine" (R. 511, 534, 546, 597) intending to "secure genuine white pine" (R. 513) and relying "on the contractor" or manufacturers to supply it to them (R. 512, 585). A representative of lumber manufacturers, who took part in some twenty odd lumber industry conferences, called at the instance of Secretary of Commerce Hoover, and who had some 200 interviews with consumers, testified that he had

"been asked repeatedly to explain the differences in the pines" and was "told that the actual differences were not understood" and had "dealers and distributors" tell him "that they did not pass on to their trade the information that so-called California white pine is not a genuine white pine", and that "actual consumers, house builders, etc." had told him that "they did not know the wood they were using and had purchased as white pine, which had come from the species Pinus ponderosa, was not a genuine white pine." (R. 1324.) The service manager for a large manufacturer of western pine said that "the entrance into the trade of California white pine in various localities" has "caused confusion, and by reason of the failure of pondosa pine it has to some extent, in my opinion, caused confusion in the name of white pine." (R. 518.) Dealers testified that "there has been confusion" with California white pine (R. 476), that even upon explanation the consumers would not understand the differences in the pines because of the diverse trade names (R. 192–193). Another dealer was attempting to avoid the use of the term "California white pine" because it is "misleading." (R. 620.) This was the line of testimony of manufacturers (R. 1187, 1278, 660–661, 1006, 1067) and of the former chief of the United States Forest Reserves (R. 1088–1089, 1142). A considerable number of respondents' witnesses flatly contradicted this testimony regarding confusion, but it is to be noted that these witnesses, who were

in many cases manufacturers and wholesalers, did not know how the retailers sold the product (R. 388) or how the contractor or consumer specified it (R. 434) or how architects and the speculative trade treated the matter (R. 441), and some of them admitted that confusion and deception were easier or at least "possible" (R. 393, 446, 395) and that there was no means for the consumer to discover substitutions. (R. 409.). As to the consumers' interest and deception, one of respondents' witnesses testified that "the lumberman cannot control those things" (R. 408).

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The insistence upon misdescription of lumber is a short-sighted policy on the part of that minority of the western pine industry who indulge in the practice. The injury to the lumber industry as a whole is clearly set forth in the testimony of an executive officer of one of the larger companies, who said (R. 349):

> * * * I think the integrity of grades, species, and manufacture of lumber is important to all lumber, because the misuse of lumber or using of the wrong lumber, or lumber in the wrong place or a wrong class of lumber for a certain thing, where the lumber does not stand up, produces a dissatisfied customer and tends to throw the market off of lumber for building material to the lumber's substitute, and I think it is important for all lumber, not only soft pine but all lumber, that each lumber be marketed

> under a name that is not misleading, and that the grades * * * be absolutely true.

Misdescription

> would naturally have the effect of producing suspicion in the mind of the person who built, the builders, architects, and also in the minds of everybody who heard of it that lumber, as such, was not fit building material and that they should use some substitute, such as brick, cement—in order to get durability.

Another leader in the pine industry testified that—

> the most deep-seated source of trouble in the lumber business has been the failure of lumber manufacturers to consider the real interests of the consumer of lumber. * * * The result of a confusion in nomenclature is the failure of a consumer to be able to get exactly what he wants, or get the material which will best suit his needs, and the result of which is, where failures occur, this same consumer naturally will turn to substitutes for lumber, with the result that lumber is gradually losing its volume over the United States. (R. 1280; and see R. 1186–1187.)

Nomenclature in the lumber industry is no less important than in the commercial life of the nation generally. The former chief of the U.S. Forest Reserves testified that nomenclature in the lumber industry—

> is important from a number of respects, among which is that of accurate identifica-

> tion of the product that is being offered to the trade. * * * The ultimate consumer should have assurance in commercial practices that he is actually obtaining the species and grades of lumber which he desires to obtain. (R. 1087.)

He also testified that there was a relation "between the good will of the public toward the lumber industry and the use of proper nomenclature in the sale of lumber." (R. 1093.) "White pine", he testified, "is still standard white pine as established in the public mind. * * * When you go beyond those trees of very similar commercial characteristics you certainly reach a point somewhere where it becomes incorrect, and I think you have reached that when you go beyond the sugar pine and Idaho white pine." (R. 1141.) "I regard the use of the term 'white' as applied to the lumber of Pinus ponderosa as the most serious instance of confusion to the buying public that now exists." (R. 1142.) Architects testified that they regarded "the terminology of the pines as a confused condition" (R. 524) and "one name ought to mean one thing and not to describe several qualities" (R. 273); another witness put the matter succinctly in saying that, although "it is immaterial what the botanical name of a particular tree might be" nevertheless "you should have a name for what you want so that when you name a thing in your specification and when you contract for it you get it by name" (R. 81).

It will not do for respondents to say that, while there is a botanical category of "white pine" which does not include ponderosa, a commercial usage has grown up which establishes ponderosa as a "white" pine—for the evidence and findings of the Commission are to the contrary and, in any event, this Court has determined that "the fact that misrepresentation and misdescription have become * * * common" is immaterial because the practice is "inherently unfair." *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U.S. 483, 493–494.

## III

THE PUBLIC INTEREST REQUIREMENT IS AMPLY SUSTAINED BY THE RECORD; AND THE MATTER OF CONSERVATION OF WHITE PINE FORESTS IS COLLATERAL AND IMMATERIAL

This Court has defined the "public interest" requirement; it involves injury to the public and injury to competitors. Not only ample evidence, but the preponderance of the evidence, discloses that the practice of labelling ponderosa as "white" pine is misleading, injurious and confusing to the trade and the consumers of lumber products.[17]

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[17] In addition to the mass of evidence summarized above, the direct injury to producers of true white pine is illustrated in the testimony of a lumberman of long experience who testified that there was difficulty in getting the retailers to handle the true white pines because of competition from other manufacturers who misrepresented their products as "white pine" (R. 111–112). The injury to producers of ponderosa who do not misdescribe their products is illustrated in the testimony of a wholesaler who said that in

Since "a substantial part of the public was still misled by the use of the labels, * * * the public had an interest in stopping the practice as wrongful * * *". *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U.S. 483, 493, 494.

So far as injury to competition is concerned, the same evidence applies and is more than ample to show actual injury, although it need only appear that the business of competitors "is *likely* to be lessened or otherwise injured" and "it is not necessary that the facts point to any particular trader or traders" since—

> it is enough that there be present or *potential* substantial competition, which is shown by proof, or appears by necessary inference, to have been injured, or to be clearly *threatened* with injury. (Italics ours.)

*Federal Trade Commission* v. *Raladam Co.*, 283 U.S. 643, 649, 651. In the case at bar, it is shown that the misdescription draws trade from producers of true white pine and that is a matter of public interest "because the unfair method employed

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attempting to sell "pondosa" he could not make his customers understand that it was the same wood as "California white pine" (R. 192–193, 194)—which confusion is shown in the testimony of other witnesses (R. 649, 675, 733, 750, 1275). Injury to the public is illustrated in the testimony of a lumber dealer who said "the lumber dealer is not particularly interested in the durability of the lumber—his customers are supposed to know what they want and all that he is in business for is to give them what they want" and the trade is not "particularly interested as to whether it is genuine white pine or not" (R. 282, 283).

threatens the existence of present or potential competition", and "the aggregate of the loss entailed * * * [is] so serious and widespread as to make the matter one of public consequence." *Federal Trade Commission* v. *Klesner*, 280 U.S. 19, 28.

Furthermore, it is to be noted that in the case at bar two types of competitors are injured—(1) the manufacturers of true white pine, and (2) the manufacturers of ponderosa who label it truthfully as ponderosa or use some trade name (generally "pondosa") not including the term "white" pine. The situation falls squarely within the rule announced in the *Winsted* case wherein these same facts (that both consumers and two branches of the trade were injured) were held to demonstrate "that it is to the interest of the public that a proceeding to stop the practice be brought" and

> also that the practice constitutes an unfair method of competition as against manufacturers * * * [of the true product] and as against those manufacturers * * * who brand their product truthfully * * *

for "when misbranded goods attract customers by means of the fraud which they perpetrate, trade is diverted from the producer of truthfully marked goods." *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U.S. 483, 493.

In attempting to avoid the applicability of the *Winsted* case, the lower court insisted that there "the sale or purchase of a material as all wool which in fact is in large part cotton presents a situa-

tion which may not be said to be parallel to that presented upon the facts in this case" because there the misbranded product was not "from some other breed of sheep". (R. 1897; 64 F. (2d) at 623.) But this is a distinction without a difference, for the finished product in either case is nevertheless misrepresented as to material or kind. The *Winsted* case involved the passing off of mixed wool and cotton as though it were all wool, and both the facts and the rule laid down seem to dispose of the case at bar completely.[18] But this Court went even further in the *Royal Milling* case and determined that, even where the products were made from identical raw materials, misdescription of the method of manufacture or the character of the manufacturer (the manufacturers describing them-

[18] In fact, the *Winsted* case was taken as controlling in the "Philippine mahogany" case which involved the misdescription of forest products as to the species of tree from which they were secured (just as in the case at bar), and this Court denied certiorari. *Indiana Quartered Oak Co.* v. *Federal Trade Commission*, 26 F. (2d) 340, certiorari denied, 278 U.S. 623. The decree in that case was later modified without opposition from the Commission, which had retried the entire character of the term "Philippine mahogany" on the merits and upon a new record in a subsequent proceeding. *Indiana Quartered Oak Co.* v. *Federal Trade Commission*, 58 F. (2d) 182. Of course, the determination of the Commission on a new record does not affect the precedent established and this Court (as said in connection with the Interstate Commerce Commission) is not interested in "the consistency of its conclusion with those reached in similar cases." *Western Paper Makers' Chemical Co.* v. *United States*, 271 U.S. 268, 271.

selves as millers when they did not in fact grind the grain from which their flour was made) was an unfair method of competition, since the unfairness of the misdescription is not altered by the manufacture and sale of "an exactly similar article, or one equally as good." *Federal Trade Commission* v. *Royal Milling Co.*, 288 U.S. 212, 216 (1933).

*The unrelated policy of conservation*

The court below sought to avoid the clearly defined authority of the Commission and the evidence disclosed in the record by adverting to the "public interest" in conservation of forests. Remarking that "the supply of the botanical white pine is far more limited than that of Ponderosa", the lower court determined that "the public is not only interested in not being deceived in the material it purchases under a certain nomenclature, but possibly in an even larger sense in the conservation of the forests." (R. 1898; 64 F. (2d) at 624.) This is immaterial and unsound for the following reasons:

(1) The court below is authorized by the Federal Trade Commission Act to review the record to discover whether the findings and order of the Commission are "supported by testimony." It is not given jurisdiction to consider and weigh some other public policy unrelated to the policy embodied in the statutes for the maintenance of free and fair competition in trade and industry. The Federal Trade Commission Act is not only an expression of

public policy but it is the law of the land which it is the duty of both the executive and judicial arms of government to apply and enforce irrespective of other policies, such as the conservation of natural resources. If other general policies may be used to oust the Commission of jurisdiction, it would be impossible to say what power, if any, remained under the Federal Trade Commission Act in view of the numerous, and perhaps conflicting, policies embodied in legislative and executive acts.

(2) The conservation policy is for the executive and legislative departments to determine. So far as it relates to the forests, it has been determined by the creation of national forests and forest preserves, and neither Congress nor the executive has directed that trade legislation be suspended as to forest products.

(3) Manufacturers of white pine forest products, in many instances, secure their raw material from the national forests and preserves under license from the Forest Service,[19] the use of which is not only duly authorized by the Government but necessary to prevent crowded growth and fire hazard.

(4) "Not considering second growth", the court below finds that in 60 years "the present stand of [white pine] timber will be practically exhausted."

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[19]As indicated in the evidence—under "Government Contracts" (R. 344, 346)—and by references to Forest Service sales (R. 843, 875, 1147, 1151, 1155, 1247, 1251, 1264).

(R. 1891; 64 F. (2d) at 619–620.) This conclusion does not take account of second growth, reforestation and reversion of farm lands. The Commission found that reforestation had, in fact, taken place, which enhanced the commercial importance of white pine. (Par. 18, R. 31.) A forestry expert testified to the adequacy of supply (R. 953 et seq.). It was shown that there is also a "reversion of farm lands" to forest even on the Atlantic Seaboard (R. 953) and an "inevitable" increase "as these immature stands come into maturity" (R. 956), and in general the production of white pine is on the "increase" (R. 970), which was corroborated by the former chief of the United States Forest Reserves (R. 1091, 1092). An architect of note testified that the desire of retailers to stock with only one species "served to build up the myth that there was no more white pine" (R. 305), which is illustrated in the testimony of another architect who related that lumber industry representatives told him "the genuine white pine was gone" (R. 499).

(5) Lastly, it is obvious that this is not even conservation, for the use of inferior woods where they are unsuited (such as the use of ponderosa for exteriors) and where they last but a small fraction of the life of true white pine is far more wasteful than the legitimate uses of the present stands of white pine. (R. 1279).

## IV

THE CIRCUIT COURT OF APPEALS EXCEEDED ITS JURISDICTION BY MAKING ITS OWN INDEPENDENT APPRAISAL OF THE EVIDENCE AND REJECTING ALL OF THE ESSENTIAL FINDINGS MADE BY THE COMMISSION THOUGH THE FINDINGS ARE "SUPPORTED BY TESTIMONY"

The Federal Trade Commission Act, under which this proceeding was initiated and under which the court below is given jurisdiction, provides that "the findings of the commission as to the facts, if supported by testimony, shall * * * be conclusive." *Federal Trade Commission Act,* Sec. 5, c. 311, 38 Stat. 717, 719; U.S.C., Title 15, Sec. 45. This Court has stated that "the weight to be given to the facts and circumstances admitted, as well as the inferences reasonably to be drawn from them, is for the commission." *Federal Trade Commission* v. *Pacific States Paper Trade Association,* 273 U.S. 52, 61, 63. Nevertheless, the court below did not give effect to the findings of the Commission and did not limit itself to determining whether the "inferences" were "reasonably to be drawn" from the testimony or whether the findings were "supported by testimony," but instead rejected the plain statements of witnesses as to the differences between white and ponderosa pine and accepted for far more than its face value the "simplified practice recommendation" of the Bureau of Standards.

Similarly, as to testimony on the misleading and confusing result of the misdescription, the court again referred to the pamphlet of the Bureau of

Standards and "assumed" that architects had a general knowledge "of the qualities of the various materials they specify" and thus could not be misled. (R. 1895; 64 F. (2d) at 622.)

On the question of "public interest", this Court has said that "in determining whether a proposed proceeding will be in the public interest the Commission exercises a broad discretion" and "its preliminary determination that institution of a proceeding will be in the public interest * * * will ordinarily be accepted by the courts." *Federal Trade Commission* v. *Klesner,* 280 U.S. 19, 28, 29–30. However, the court below, relying upon the wholly collateral and inapplicable policy of forest conservation, found that the maintenance of fair competition in the white pine lumber industry would not be consistent with conservation of resources and, therefore, not in the interest of the public.

## CONCLUSION

The following main propositions on the questions of "unfairness", "public interest", and the jurisdiction of the court below are established:

(1) Pinus ponderosa differs from white pine botanically, in character, in quality, and in popular and commercial significance. Trade names such as California "white" pine, when applied to ponderosa, are misleading, and the use of such terms is "unfair" under the Trade Commission Act.

(2) Architects, consumers and the trade generally, in ordering lumber or lumber products, specify "white pine" and expect to receive true or genuine white pine. Many dealers, however, either knowingly or unknowingly, upon such orders substitute ponderosa, which they purchase from manufacturers or wholesalers under trade names such as California "white" pine; this substitution or "passing off" is aided by the superficial similarity of ponderosa and true white pine, and dealers are induced to indulge in the practice because of the lower price of ponderosa and their tendency to stock only one kind of pine; the practice is, finally, facilitated and made safe for the dealer since the lumber is invoiced to him as some form of "white" pine. As a result of this misdescription and substitution, consumers and the trade have become confused and the lumber industry as a whole has suffered. These facts bear both upon the "unfairness" of the practice and the "public interest" in its prevention.

(3) Consumers are injured in not receiving the products they specify in their orders. Manufacturers, wholesalers and dealers in true white pine are injured since the cheaper ponderosa, when labeled with some trade name including the word "white", draws trade from them; in addition, those who manufacture and market ponderosa without using trade names including the misleading word "white" find themselves at a disadvantage in com-

petition with those who market the same product under the deceptive trade names. These facts satisfy the "public interest" requirement of the Federal Trade Commission Act.

(4) The great weight of the testimony supports each of these facts. The Commission found them to be true. Yet the court below set aside the Commission's orders to cease the practice and determined that the misdescription was not an "unfair" method of competition and its suppression not in the "public interest." The court is not given jurisdiction to so reject the order and findings of the Commission which are "supported by testimony".

It is respectfully submitted that the decrees below should be reversed, with directions to affirm the orders of the Commission.

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## APPENDIX

Section 5 of the Federal Trade Commission Act, c. 311, 38 Stat. 717, 719 (U.S. Code, Title 15, Sec. 45), provides, *inter alia:*

> That unfair methods of competition in commerce are hereby declared unlawful.
>
> The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.
>
> Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or

corporation may make application, and upon good cause shown may be allowed by the commission, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission. If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of the application and transcript the court shall cause

notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission. The findings of the commission as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, the court may order such additional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

Any party required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said circuit court of

appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission shall be exclusive.

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